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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 MERLE KOVTUN, On Behalf of Himself
and All Others Similarly Situated,

12 Plaintiff,

13 vs.

14 VIVUS, INC., LELAND F. WILSON, and
15 WESLEY W. DAY, PHD,

16 Defendants.

CASE NO.: 4:10-cv-04957-PJH

**MEMORANDUM IN SUPPORT OF BRENT
DAWSON AND RICHARD WAYNE'S
MOTION TO BE APPOINTED AS LEAD
PLAINTIFFS AND FOR APPROVAL OF
THEIR CHOICE OF COUNSEL**

DATE: February 9, 2011

TIME: 9:00 a.m.

COURTROOM: 3, Oakland

1 that: (a) the studies conducted by Vivus and submitted to the Endocrinologic and Metabolic Drugs
2 Advisory Committee of the FDA (the "FDA Panel") could not support FDA Panel approval for
3 Qnexa's use to treat obesity as a chronic condition, and, at the very least, longer-term clinical studies
4 would be needed to determine whether Qnexa was safe for its intended use to treat chronic obesity;
5 (b) the trial results showed worrisome adverse effects of the type that scuttled approval for other
6 obesity drugs, including increased risk of suicide, cardiovascular events, and birth defects; (c) four to
7 seven times as many patients taking the highest dose of Qnexa, compared to patients taking lower
8 doses or placebos, dropped out of the study because of adverse side effects such as anxiety, sleep
9 disorders, or depression; and (d) Qnexa would likely receive a "Pregnancy Category X" label from
10 the FDA due to risks of birth defects (teratogenicity), instead of the proposed "Pregnancy Category
11 C" label, thereby potentially eliminating a huge swath of potential Qnexa customers.

12 On July 15, 2010, the FDA Panel held a hearing to review Qnexa. Following the lengthy
13 review and discussion, the FDA Panel voted against recommending Qnexa based on concerns
14 regarding adverse effects and the unknown impact of long-term use beyond the 56-week clinical
15 study period. The FDA Panel voted 10-to-6 in the negative on the question of whether the "overall
16 risk-benefit assessment of Qnexa is favorable to support approval." When news of the vote was
17 publicly announced on July 15, 2010, the market price of Vivus common stock plummeted, falling
18 \$6.70 per share, or 55%, in one day on unusually high trading volume of over 42.3 million shares.
19 On October 28, 2010, the FDA followed the recommendation of the FDA Panel and rejected Vivus's
20 NDA for Qnexa.

ARGUMENT

I. THE COURT SHOULD APPOINT MOVANTS AS LEAD PLAINTIFFS

A. The Procedure Required By The PSLRA

The PSLRA establishes the procedure for appointment of the lead plaintiff in “each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.” Sections 21D(a)(1) and 21D(a)(3)(B), 15 U.S.C. §§ 78u-4(a)(1) and (a)(3)(B).

First, the plaintiff who files the initial action must publish notice to the class within 20 days after filing the action, informing class members of their right to file a motion for appointment of lead plaintiff. Section 21D(a)(3)(A)(i), 15 U.S.C. § 78u-4(a)(3)(A)(i). The PSLRA requires the court to consider within 90 days all motions, filed within 60 days after publication of that notice, made by any person or group of persons who are members of the proposed class to be appointed lead plaintiff. Sections 21D(a)(3)(A)(i)(II) and 21D(a)(3)(B)(i), 15 U.S.C. §§ 78u-4(a)(3)(A)(i)(II) and (a)(3)(B)(i).

The PSLRA provides a presumption that the most “adequate plaintiff” to serve as lead plaintiff is the “person or group of persons” that:

- (aa) has either filed the complaint or made a motion in response to a notice;
- (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Section 21D(a)(3)(B)(iii)(I), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The presumption may be rebutted only upon proof by a class member that the presumptively most adequate plaintiff “will not fairly and adequately protect the interests of the class” or “is subject to unique defenses that render such plaintiff incapable of adequately representing the class.” Section 21D(a)(3)(B)(iii)(II), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

As set forth below, Movants satisfy the foregoing criteria and are not aware of any unique defenses that Defendants could raise against them. Therefore, Movants are entitled to the presumption that they are the most adequate lead plaintiffs to represent Plaintiffs and, as a result, should be appointed lead plaintiffs in the Action.

1. Movants Are Willing To Serve As Class Representatives

On November 3, 2010, counsel in the first-filed action caused a notice (the “Notice”) to be published pursuant to Section 21D(a)(3)(A)(i), which announced that a securities class action had been filed against Vivus, and which advised putative class members that they had until January 3, 2011 to file a motion to seek appointment as a lead plaintiff in the action.¹

Movants have reviewed the complaint filed in the Action and have timely filed their motion pursuant to the Notice. In doing so, Movants have attached their certifications attesting to their willingness to serve as representative parties of the Class and provide testimony at deposition and trial, if necessary. *See* Goldberg Decl. Ex. B. Accordingly, Movants satisfy the first requirement to serve as lead plaintiffs. Section 21D(a)(3)(B)(iii)(I)(aa), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa).

2. Movants Are The Most Adequate Lead Plaintiffs

Under the PSLRA, any member of the purported class may move for appointment as lead plaintiff within 60 days of the publication of notice that the action has been filed. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). Subsequently, the court “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of the class members” 15 U.S.C. § 78u-4(a)(3)(B)(i).

¹ *See* Declaration of Michael M. Goldberg (“Goldberg Decl.”) Ex. A.

Movants believe their \$133,077 loss constitutes the largest financial interest in the outcome of the Action. *See* Goldberg Decl. Ex. C. As such, Movants are the most adequate lead plaintiffs and should be appointed as lead plaintiffs.

3. Movants Satisfy The Requirements Of Rule 23(a) Of The Federal Rules Of Civil Procedure

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA also states that at the outset of the litigation, the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). With respect to the qualifications of a class representative, Rule 23(a) requires generally that representatives’ claims be typical of those of the class, and that representatives will fairly and adequately protect the interests of the class. *See In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002); *Ferrari v. Gisch*, 225 F.R.D. 599, 606 (C.D. Cal. 2004); *Ruland v. InfoSonics Corp.*, No. 06CV1231, 2006 WL 3746716, at *2 (S.D. Cal. Oct. 23, 2006).

Claims are “typical” under Rule 23 if they are “reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Ferrari*, 225 F.R.D. at 606 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). Likewise, Rule 23(a) also requires that the person(s) representing the class be able to “fairly and adequately protect the interests’ of all members in the class.” *Ferrari*, 225 F.R.D. at 607 (citation omitted).

The claims asserted by Movants are typical of those of the Class. Movants, like the members of the Class, acquired shares of Vivus during the Class Period at prices artificially inflated by Defendants’ materially false and misleading statements, and were damaged thereby. Thus, their claims are typical, if not identical, to those of the other members of the Class because Movants suffered losses similar to those of other Class members and their losses result from Defendants’

1 common course of conduct. Accordingly, Movants satisfy the typicality requirement of Rule
2 23(a)(3).

3 Movants are also adequate representatives for the Class. There is no antagonism between
4 their interests and those of the Class. Moreover, Movants have retained counsel highly experienced
5 in prosecuting securities class actions, and will submit their choice to the Court for approval
6 pursuant to Section 21D(a)(3)(B)(v), 15 U.S.C. § 78u-4(a)(3)(B)(v).

7 Accordingly, at this stage of the proceedings, Movants have made the preliminary showing
8 necessary to satisfy the typicality and adequacy requirements of Rule 23 and, therefore, satisfy
9 Section 21D(a)(3)(B)(iii)(I)(cc), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc).

10 **II. MOVANTS' CHOICE OF LEAD COUNSEL SHOULD BE APPROVED**

11 The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to
12 court approval. Section 21D(a)(3)(B)(v), 15 U.S.C. § 78u-4(a)(3)(B)(v); Section 21D(a)(3)(B)(v),
13 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should interfere with the lead plaintiff's selection of
14 counsel only when necessary "to protect the interests of the class." Section 21D(a)(3)(B)(iii)(II)(aa),
15 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa); Section 21D(a)(3)(B)(iii)(II)(aa), 15 U.S.C. § 78u-
16 4(a)(3)(B)(iii)(II)(aa).

17 Movants have selected and retained Bernstein Liebhard as the proposed lead counsel for the
18 Class. Bernstein Liebhard has extensive experience prosecuting complex securities class actions,
19 such as this one, and is well qualified to represent the Class. *See* Goldberg Decl. Ex. D for the firm
20 resume of Bernstein Liebhard. As a result, the Court may be assured that by approving Bernstein
21 Liebhard as lead counsel, the Class is receiving the best legal representation available.

Bernstein Liebhard has frequently been appointed as lead counsel since the passage of the
PSLRA, and has frequently appeared in major actions before this and other courts throughout the

country. Indeed, THE NATIONAL LAW JOURNAL has recognized Bernstein Liebhard for eight consecutive years as one of the top plaintiffs' firms in the country. Bernstein Liebhard has also been listed in THE LEGAL 500, a guide to the best commercial law firms in the United States, for the past three years.

Four of Bernstein Liebhard's recent outstanding successes include:

- *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-CV-8144 (CM) (S.D.N.Y. 2009) (settlement: \$400 million);
- *In re Royal Dutch/Shell Transport Securities Litigation*, No. 04-374 (JAP) (D.N.J. 2008) (Judge Joel A. Pisano gave final approval to a U.S. settlement with a minimum cash value of \$130 million. This settlement is in addition to a \$350 million European settlement on behalf of a class of non-U.S. purchasers of Shell securities on non-U.S. exchanges, which the court-appointed lead plaintiffs and Bernstein Liebhard were, in the words of Judge Pisano, a "substantial factor" in bringing about);
- *In re Deutsche Telekom AG Securities Litigation*, No. 00-CV-9475 (SHS) (S.D.N.Y. 2005) (settlement: \$120 million, representing 188% of the recognized losses); and
- *In re Cigna Corp. Securities Litigation*, No. 2:02CV8088 (E.D. Pa. 2007) (settlement: \$93 million).

Further, Bernstein Liebhard partner Stanley Bernstein serves as Chairman of the Executive Committee in *Initial Public Offering Securities Litigation* ("IPO"), No. 21 MC 92 (SS) (S.D.N.Y. 2009), pending before Judge Shira Scheindlin. The IPO litigation is one of the biggest securities class actions ever prosecuted, coordinating 309 separate securities class actions in one proceeding. On October 5, 2009, the Court granted final approval to a \$586 million settlement.

Glancy Binkow also has extensive experience in litigating securities class actions. *See* Goldberg Decl. Ex. E.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court: (1) appoint Movants as lead plaintiffs for the Class in the Action and all subsequently-filed, related actions; and (2) approve Bernstein Liebhard and Glancy Binkow as lead and liaison counsel, respectively, for the Class.

DATED: January 3, 2011

Respectfully submitted,

GLANCY BINKOW & GOLDBERG LLP

s/Michael Goldberg

Michael Goldberg

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Liaison Counsel for Movants and Proposed

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Counsel for Movants and Proposed Lead Counsel

for the Class

PROOF OF SERVICE VIA ELECTRONIC POSTING PURSUANT TO NORTHERN DISTRICT OF CALIFORNIA LOCAL RULES AND ECF GENERAL ORDER NO. 45

I, the undersigned, say:

I am a citizen of the United States and am employed in the office of a member of the Bar of this Court. I am over the age of 18 and not a party to the within action. My business address is 1801 Avenue of the Stars, Suite 311, Los Angeles, California 90067.

On January 3, 2011, I caused to be served the following documents:

1. NOTICE OF MOTION OF BRENT DAWSON AND RICHARD WAYNE TO BE APPOINTED AS LEAD PLAINTIFFS AND FOR APPROVAL OF THEIR CHOICE OF COUNSEL
2. MEMORANDUM IN SUPPORT OF BRENT DAWSON AND RICHARD WAYNE'S MOTION TO BE APPOINTED AS LEAD PLAINTIFFS AND FOR APPROVAL OF THEIR CHOICE OF COUNSEL
3. DECLARATION OF MICHAEL GOLDBERG IN SUPPORT OF BRENT DAWSON AND RICHARD WAYNE'S MOTION TO BE APPOINTED AS LEAD PLAINTIFFS AND FOR APPROVAL OF THEIR CHOICE OF COUNSEL
4. [PROPOSED] ORDER APPOINTING LEAD PLAINTIFFS AND APPROVING CHOICE OF COUNSEL

By posting this document to the ECF Website of the United States District Court for the Northern District of California, for receipt electronically by the parties as reflected on the attached Court's Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 3, 2011, at Los Angeles, California.

s/Michael Goldberg
Michael Goldberg

Mailing Information for a Case 4:10-cv-04957-PJH

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Nicole Marie Duckett**
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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)

